in the

Supreme Court

of the

United States

OCTOBER TERM 1977

CASE NO. 77-363

CITY OF MIAMI BEACH,
a municipal corporation

Petitioner

vs.

BERNARD JACOBS, d/b/a THE PARK APARTMENT HOTEL, RUTH SEWALL, d/b/a NASSAU HOTEL, JOSEPH LIBBY, d/b/a CROYDON ARMS APT., IRVING SCHOENFELD, d/b/a LINCOLN PLAZA, STANLEY FRANKEL, d/b/a ALAMO HOTEL, ISIDORE LEVINE, d/b/a LESLIE HOTEL, AL FISHMAN, d/b/a COMMODORE HOTEL, MORRIS STEINBERG, d/b/a MALABO APARTMENT, on behalf of themselves and all others similarly situated,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA; TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA; AND TO THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA

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INDEX

STATUTES AND AUTHORITIES

CASES CITED

in the

Supreme Court

of the

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CITY OF MIAMI BEACH,
a municipal corporation

Petitioner

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BERNARD JACOBS, d/b/a THE PARK APARTMENT HOTEL, RUTH SEWALL, d/b/a NASSAU HOTEL, JOSEPH LIBBY, d/b/a CROYDON ARMS APT., IRVING SCHOENFELD, d/b/a LINCOLN PLAZA, STANLEY FRANKEL, d/b/a ALAMO HOTEL, ISIDORE LEVINE, d/b/a LESLIE HOTEL, AL FISHMAN, d/b/a COMMODORE HOTEL, MORRIS STEINBERG, d/b/a MALABO APARTMENT, on behalf of themselves and all others similarly situated,

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The Petitioner, the CITY OF MIAMI BEACH, a municipal corporation of the State of Florida, created by a Special Act of the Legislature, prays that this Court issue its writ of certiorari to the Supreme Court of the State of Florida; to the Third District Court of Appeal of Florida; and to the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, to review the judgment of the latter Court made and entered on November 24, 1975; affirmed by the Third District Court of Appeal of Florida on December 23, 1976 (Petition for Rehearing denied on January 13, 1977); and to review the order of the Florida Supreme Court entered on May 31, 1977 denying the CITY'S Petition for Writ of Certiorari to the Third District Court of Appeal (Petition for Rehearing denied on July 29, 1977).

REPORTS OF OPINIONS IN COURTS BELOW

The opinion of the Circuit Court of the Eleventh Judicial Circuit of Florida is unreported, but appears in the appendix hereto.

The decision of the Third District Court of Appeal is reported in 341 So.2d 236-238. A copy of said opinion is set forth in the appendix hereto.

The opinion of the Florida Supreme Court is not yet reported, but is also set out in the appendix.

STATEMENT OF GROUNDS OF JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), because the petitioning City has been deprived of due process of law and denied the equal protection of the law under the Fifth and Fourteenth Amendments to the United States Constitution by state action through the decree of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, the decision and judgment of the Third District Court of Appeal of Florida affirming the same and the decision and judgment of the Florida Supreme Court denying certiorari, as agencies of the State of Florida.

The decisions on which review is sought were rendered by the highest courts of the state. All appellate remedies of the state courts have been exhausted.

The jurisdiction of this Honorable Court is also invoked pursuant to Rule 19-1(a) of the Rules of this Honorable Court because the courts hereinabove enumerated have denied a federal question of substance not in accord with the applicable decisions of this Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

DATES OF JUDGMENTS SOUGHT TO BE REVIEWED AND TIME OF ENTRY

The judgment of the Circuit Court is dated November 24, 1975 and said judgment was entered on January 5, 1976.

The judgment of the Third District Court of Appeal is dated December 23, 1976 and the date of entry is the same.

The judgment of the Florida Supreme Court is dated May 31, 1977 and said judgment was entered on the same day.

The order of the Florida Supreme Court denying Petition for Rehearing was dated July 29, 1977 and was entered on the same day.

STATUTORY PROVISION CONFERRING JURISDICTION ON THIS COURT

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) and Rule 19-1(a) of this Court.

QUESTION PRESENTED FOR REVIEW

The Courts below have entered, approved and condoned a judgment entered against the CITY in a so-called "class suit" in which no alleged member thereof received any notice whatsoever of the institution of the suit, or its progress before or even after judgment. All this was done under authority of Florida Rules of Civil Procedure, Rule 1.220 governing Class Actions, which reads as follows:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

This Rule is so vague and uncertain that any court is authorized to exercise such unbridled discretion thereunder as to render the Rule constitutionally impermissive and permits the Petitioner to be deprived of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Florida Constitution; it permits the courts of the State of Florida to ignore the due process requirement for "class actions" mandated by the decisions of this Honorable Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140 (1974), *American Pipe and Construction Co. v. State of Utah*, 414 U.S. 538, 38 L.Ed.2d 713, 94 S.Ct. 756 (1974), and *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115 (1940).

STATEMENT OF THE CASE

The Respondents (eight of them) filed a suit in equity in the Circuit Court of the Eleventh Judicial Circuit of Florida to obtain the refund from the CITY of monies collected by the City from them under the provisions of an ordinance imposing a "fire-line charge" against the owners of all multiple-family residences and commercial buildings using City water service. Parenthetically, it may be said that a "fire-line" is an additional water line to a building to

provide an additional supply of water for a fire hose installed in such buildings. A copy of this ordinance appears as Exhibit A to the Complaint. (App. 9-10)

This suit was brought as a purported "class action" even though no notice whatsoever at any stage of the proceedings was given to any member of the so-called "class."

Following appropriate pleadings, the case came to trial, following which the Circuit Court entered a decree against the CITY holding the City ordinance to be unconstitutional and requiring the CITY to refund to the members of the class any charge paid by them under this ordinance. The court retained jurisdiction for the purpose of awarding attorney's fees to the attorney for the plaintiffs and members of the so-called "class." (Appendix pp. 11-13)

This decree was appealed to the Third District Court of Appeal and that court affirmed the judgment of the Circuit Court by an opinion and judgment filed on July 29, 1975 and reported in 315 So.2d 227. This opinion is set out at pages 14-17 of the appendix.

Thereupon the Respondents returned to the Circuit Court for a trial on attorney's fees to be awarded to the attorney for the Respondents and as the self-appointed attorney "representing" the members of the purported "class." This hearing was held, over the objection of the Petitioner City, on the ground that no notice had been given to any member of the so-called "class" (Appendix pages 18-19). Notwithstanding, the Circuit Court entered judgment awarding a 37% attorney's fee on the entire amount collected by the City under the ordinance, to be paid out of each "class member's" share of the recovery.

On appeal, the Third District Court of Appeal affirmed the award of the 37% attorney's fee; held that the City had no standing to raise the objection of lack of notice to members of the class; but reversed that portion of the decree of the Circuit Court requiring that the attorney's fee be paid on the full amount of the money collected by the City under the ordinance. The objection made in the Third District Court of Appeal to lack of notice was raised by proper assignments of error. The opinion of the Court appears at pages 21-24 of the appendix.

The CITY'S Petition for Rehearing was denied, and the CITY'S Petition for Writ of Certiorari to the Florida Supreme Court was also denied, one Justice dissenting. The question of lack of notice was raised in the CITY'S Petition for Writ of Certiorari (appendix pp. 25-28); in its supporting briefs and by its Petition for Rehearing to the order of the Florida Supreme Court denying certiorari (appendix pp. 29-30; 31-32). The Petition for Rehearing was denied by the Florida Supreme Court on July 29, 1977 and granting the CITY a stay of the proceedings for 30 days to enable the CITY to file this Petition for Writ of Certiorari (appendix pp. 33).

ARGUMENT

The Courts below have approved and condoned the award of a fee in a purported "class suit" to an attorney for representing alleged members of an alleged "class;" the fee to be deducted from each member's aliquot share of monies paid, even though no member of the alleged "class" had any knowledge of the suit, nor of the proceedings had on the fixing and award of the attorney's fee.

Rule of Procedure governing class suits in Florida. This Rule is set forth hereinabove. Under this Rule anything goes. The Petitioner contends that any procedure for notice and opportunity to be heard less than that set forth in the Federal Rules governing class suits (Rule 23) is constitutionally prohibited. The City is a directly affected party because a void proceeding does not avail the City as a defense in another suit brought against it by a person disclaiming representation in the suit complained of.

Respectfully submitted,

BURNETT ROTH
Attorney for Petitioner
420 Lincoln Road, Suite 329
Miami Beach, Florida 33139
Telephone: (305) 538-7423

Of Counsel:

JOSEPH A. WANICK
City Attorney
1700 Convention Center Drive
Miami Beach, Florida 33139
Telephone: (305) 673-7470

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition for Writ of Certiorari and Appendix thereto has been served by mail upon JOSEPH PARDO, ESQ., Attorney for Respondents, Penthouse One, Roberts Building, 28 West Flagler Street, Miami, Florida 33130, this day of September, 1977.

Appendix

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT
IN AND FOR
DADE COUNTY, FLORIDA.

NO. 72-22041

BERNARD JACOBS, d/b/a THE PARK APARTMENT HOTEL, RUTH SEWALL, d/b/a NASSAU HOTEL, JOSEPH LIBBY, d/b/a CROYDON ARMS APT., IRVING SCHOENFELD, d/b/a LINCOLN PLAZA, STANLEY FRAIBEL, d/b/a ALAMO HOTEL, ISIDORE LEVINE, d/b/a LESLIE HOTEL, AL FISHMAN, d/b/a COMMODORE HOTEL, & MORRIS STEINBERG, d/b/a MALABO APARTMENT, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

THE CITY OF MIAMI BEACH,
a municipal corporation,

Defendant.

CLASS ACTION

COMES NOW the Plaintiffs, by and through their undersigned attorney and sues the Defendant, THE CITY OF MIAMI BEACH, a municipal corporation, and alleges:

1. This is a Class Action for relief within the jurisdiction of this Court, brought pursuant to Florida Rules of Civil Procedure, Rule 1.220.

2. Plaintiffs are property owners or lessees of property, located on Miami Beach, Florida, and the Defendant is a municipal corporation of the State of Florida, incorporated under the laws of the State of Florida on or about March 26, 1915.

3. As part of the Code of THE CITY OF MIAMI BEACH, THE CITY OF MIAMI BEACH furnishes certain water and private fire service; and fire-line service to the various property owners of THE CITY OF MIAMI BEACH.

4. On or about September 29, 1970, the Defendant, THE CITY OF MIAMI BEACH passed and adopted Ordinance Number 1850 and ordinance amending Chapter 45 of the Code of THE CITY OF MIAMI BEACH, FLORIDA, which provided as follows:

> "Section 1. At Section 45.6 of Chapter 45 of "The Code of the City of Miami Beach, Florida" be and the same is hereby amended by adding the following additional paragraph thereto immediately following paragraph (i):"
>
> "That there is hereby imposed, in addition to any and all other fees or charges imposed by this Chapter, the following additional fees and charges to be known as "fire-line charges", for fire-line connections, stand-by service and maintenance:"

> "Eight inch fire-lines, $42.50 monthly, $510.00 annually; Six-inch fire-lines, $25.00 monthly, $300.00 annually; Four-inch fire-lines, $20.00 monthly, $240.00 annually; Three-inch fire-lines, $20.00 monthly, $240.00 annually"
>
> "Said fire-line charges shall be payable at the time of all other monthly service charges as set forth in Section 45.4 of the Code."

5. Pursuant to Ordinance Number 1850, the Defendant, THE CITY OF MIAMI BEACH, did proceed to send out bills and statements to the property owners for said "fire-line charges" copy of a representative statement is attached hereto and made a part hereof.

6. That in addition to the water charges sent by the Water Division, there was included the fire-line fee with the additional demand that five percent (5%) penalty will be added if not paid within a specific period of time, which was approximately twelve (12) days after said statement was rendered and an additional five percent (5%) penalty per month, so long as said statements remained unpaid.

7. That in addition, Section 45-6 of THE MIAMI BEACH City Code provided:

> "(e) Violation by the owner of any of the regulations in this section shall terminate the regulation set forth in sub-sections (a), (b), (c) and (d) of this section and because of such violation, the Water Department may disconnect the pipes or stop the flow of water through the same.

The statement rendered by THE CITY OF MIAMI BEACH also provided:

> "If bill is not paid on or before due date, water service will be disconnected."

8. The Plaintiffs' Class consists of all persons subject to the additional fees and charges known as "fire-line charges" for fire-line connections, stand-by service and maintenance, imposed pursuant to Ordinance Number 1850.

9. That all of the Plaintiffs herein and all those similarly situated paid said fire-line charges, as above set forth, under protest, to THE CITY OF MIAMI BEACH, the Defendant herein, under the threat and fear of having their water supply shut off in the event that said bills were not paid, and in addition, in fear of being subjected to the five percent (5%) penalty added per month to said charges so long as said fees were not paid.

10. The Class of Plaintiffs set forth herein, and all those similarly situated, who duly paid, under protest, the fire-line charges set forth above, consist of approximately fifteen hundred (1500) to two thousand (2,000) members and are so numerous that the joinder of all members is impractical.

11. That the Plaintiffs herein charge that THE CITY OF MIAMI BEACH Ordinance Number 1850, now Section 45-6 (j) of The Code of The City of Miami Beach, is invalid, unreasonable, arbitrary, discriminatory, illegal and contrary to the laws of the State of Florida.

12. That the Plaintiffs herein charge that the rates set forth, as additional fees, and charges, known as additional fire-line charges, set forth in Ordinance Number 1850, now Section 45-6(j), are unreasonable and unjust and should be set aside and vacated.

13. That the Honorable George E. Schulz, in the case of Mac-ar-Mel, Inc., et al., plaintiffs, vs. The City of Miami Beach, Defendant, Case Number 71-13460, has declared said Ordinance Number 1850, now Section 45-6(j), as invalid, unreasonable, arbitrary, discriminatory, illegal and contrary to the laws of the State of Florida and have been declared to be unreasonable and unjust and has been set aside and vacated.

14. That the Plaintiffs herein, although demand has been made to THE CITY OF MIAMI BEACH for the return of the amounts of money previously paid by the Plaintiffs and all those similarly situated, for the charges known as the "fire-line charges", THE CITY OF MIAMI BEACH has refused to return said money to the members of the Plaintiff's Class, who paid under protest said "fire-line charges".

15. That the questions of law and fact herein are common to all members of the Class.

16. That the claims or defenses of the representative parties are typical of the defenses or claims of the Classes.

17. That the representative parties will fairly and adequately protect the interest of the Classes, the members of which are determinable by a practical discovery.

18. That the bringing of separate actions by or against individual members of the Classes is impractical and further might result in inconsistent or varying adjudication with respect to individual members of the Class, which would establish incompatable standards of conduct for both Classes.

19. The questions of law and fact, to the members of the Classes predominate over any questions affecting only individual members, thereby making the Class Action superior to other available methods for a fair and efficient adjudication of the within controversy.

20. The Defendant was placed on notice of the fact that its billing and collecting of the fire-line charges was improper, unreasonable and arbitrary and demand was made to THE CITY OF MIAMI BEACH not to collect said improper charges, under Ordinance Number 1850.

21. That the Defendant, on or about July, 1971, was ordered and enjoined, THE CITY OF MIAMI BEACH, its agents, servants and employees responsible for enforcing Ordinance Number 1850 of THE CITY OF MIAMI BEACH, now known as Section 45-6(j), of the Code of The City of Miami Beach, notwithstanding said injunction, against the enforcement of said Ordinance, the Defendant, THE CITY OF MIAMI BEACH, still continued to send out its bills and demand for the payment of the bills under the threats of the five percent (5%) monthly penalty as well as the threats of the cutting off of the water supply to the property owners using said fire-line charges.

22. That as a result of the action of the Defendant, THE CITY OF MIAMI BEACH became indebted to the Plaintiffs and the members of their Class for the money

that had been received by said Defendant for the unlawful, unreasonable, arbitrary, fire-line charges imposed pursuant to the invalid Ordinance Number 1850.

23. Although demand had been made to the Defendant for the return of said fire-line charges paid and the said sum is now due and owing with interest thereon to the Plaintiffs and to all those similarly situated.

24. That as a result of the actions of the Defendant, the Plaintiffs and the members of their Class have suffered damages and will continue to suffer damages and have required and will require the services of an attorney to prosecute this cause, and have agreed to pay him a reasonable attorney's fee for said representation.

WHEREFORE, the Plaintiffs request this Court to:

A. Take jurisdiction of the parties and this cause.

B. Determine and declare this to be an action by a Class of the Plaintiffs against the Defendant.

C. Define and determine the Class of Plaintiffs.

D. Order an accounting of the fire-line charges collected by the Defendant pursuant to the invalid Ordinance Number 1850.

E. Render a Judgment for the Plaintiffs and their Class for compensatory damages suffered as a result of said invalid fire-line charges exacted over the protests of the Plaintiffs and all those similarly situated.

F. Render a Judgment in favor of the Plaintiffs and all those similarly situated for costs, interest and a reasonable attorney's fee.

G. Grant such other relief as this Court may deem appropriate and just.

/s/ Joseph Pardo
JOSEPH PARDO
Attorney For
Plaintiffs and All
Those Similarly Situated
1406 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

ORDINANCE NO. 1850

AN ORDINANCE AMENDING CHAPTER 45 OF "THE CODE OF THE CITY OF MIAMI BEACH, FLORIDA."

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MIAMI BEACH, FLORIDA:

SECTION 1. That Section 45.6 of Chapter 45 of "The Code of the City of Miami Beach, Florida," be and the same is hereby amended by adding the following additional paragraph thereto immediately following paragraph (i):

"That there is hereby imposed, in addition to any and all other fees or charges imposed by this chapter, the following additional fees and charges to be known as 'Fire Line Charges', for Fire Line connections, stand by service and maintenance:

8 inch Fire Lines $42.50 monthly
$510.00 annually
6 inch Fire Lines $25.00 monthly
$300.00 annually
4 inch Fire Lines $20.00 monthly
$240.00 annually
3 inch Fire Lines $20.00 monthly
240.00 annually

Said Fire Line charges shall be payable at the time of all other monthly service charges as set forth in Section 45.4 of the Code."

SECTION 2. All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed.

SECTION 3. The health and welfare of the City being in peril, the three readings of this ordinance shall be had in one session and the City Council finding that this ordinance is necessary for the immediate protection of its citizens, it shall therefore go into effect October 1, 1970.

PASSED and ADOPTED this 29th day of September, 1970.

(Signed) Jay Dermer
Mayor

Attest:
(Signed) Ruth B. Rouleau
City Clerk-Finance Director

(SEAL)

1st reading - September 29, 1970
2nd reading - September 29, 1970
3rd reading - September 29, 1970
POSTED - October 27, 1970

PLAINTIFFS' EXHIBIT "A"

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION

NO. 72-22041 (Judge Testa)

BERNARD JACOBS, et als.,
Plaintiff,

vs.

CITY OF MIAMI BEACH,
a municipal corporation,
Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR THE ENTRY OF ORDER ON MANDATE AND AWARDING A REASONABLE ATTORNEY'S FEE

THIS MATTER coming on to be heard after due notice, upon the Plaintiff's Motion To The Entry Of An Order Pursuant To the Mandate of the District Court of Appeal, Third District, revised Opinion, dated July 29, 1975 (315 So.2d 227), and for the determination of a reasonable attorney's fee to be paid to JOSEPH PARDO, attorney, representing the Class who paid the "fire-line charges", and this Court having heard the testimony of the attorney and the expert testimony to support said Motion and determination as to a reasonable attorney's fee, and having considered the various elements necessary in computing a reasonable attorney's fee as set forth in 32 F.S.A. Code of Professional Responsibility, Canon 2 (D.R.2-106

(b)) and this Court being personally familiar with the work performed by Joseph Pardo, as attorney for the Class in this cause, it is upon due consideration:

ORDERED, ADJUDGED and DECREED that the Defendant, CITY OF MIAMI BEACH, shall pay to JOSEPH PARDO, as attorney representing the Class who paid the "fire-line charges" to the CITY OF MIAMI BEACH, as a reasonable attorney's fee for said representation, an amount equal to THIRTY-SEVEN PERCENT (37%), of the sum of monies collected by the CITY OF MIAMI BEACH from the Class who paid the "fire-line charges", which sum shall include interest at SIX PERCENT (6%) per annum from the date of the entry of this Court's Amended Final Decision, dated April 8, 1974, until paid, pursuant to F.S.A. §55.03, and said sums shall be paid forthwith, and it is further

ORDERED, ADJUDGED and DECREED that the CITY OF MIAMI BEACH shall refund to each of the members of the Class who paid to the CITY OF MIAMI BEACH who paid the "fire-line charges" the amounts paid by said members of the Class, together with interest, as aforesaid, less the amount of THIRTY-SEVEN PERCENT (37%) hereinbefore awarded to JOSEPH PARDO, as a reasonable attorney's fee, for representing said Class, and said sums shall be paid forthwith, and it is further:

ORDERED, ADJUDGED and DECREED that the CITY OF MIAMI BEACH shall, within 30 days from the date hereof, furnish to JOSEPH PARDO, as attorney for the Class, the names, addresses and amounts paid by the customers of the Class who paid the "fire-line charges" to the CITY OF MIAMI BEACH. (see paragraph 16 of this Court's Final Decision, dated April 8, 1974), and the CITY

OF MIAMI BEACH shall permit JOSEPH PARDO, or his authorized representative, to inspect and verify and copy the names addresses and amounts of the figures and information furnished by the CITY OF MIAMI BEACH, and it is further:

ORDERED, ADJUDGED and DECREED that this Court retains jurisdiction for the purpose of enforcing the terms and conditions of this Order and for the entry of such other and further Orders as may be necessary to implement the enforcement of this Court's Decree.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 24 day of November, 1975.

THOMAS A. TESTA
CIRCUIT COURT

Proposed Order mailed 11/14/75
to: Broad & Cassel & Joseph A. Wanick

Conformed Copies To:

Joseph Pardo, Esq.
Joseph A. Wanick, Esq.
Broad & Cassel, Esqs.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1975
CASE NO. 74-677

CITY OF MIAMI BEACH, a
municipal corporation,

Appellant,

vs.

BERNARD JACOBS, et al.,

Appellees.

Opinion filed July 29, 1975.

An Appeal from the Circuit Court for Dade County, Thomas A. Testa, Judge.

Joseph A. Wanick, City Attorney, for appellant.

Broad & Cassel; Joseph Pardo, for appellees.

Before BARKDULL, C.J., and PEARSON and HENDRY, JJ.

REVISED OPINION

PEARSON, Judge.

The City of Miami Beach appeals a final judgment in a class action suit[1] which ordered the repayment to the class of money paid by the members of the class to the City under an ordinance which imposed fees and charges to be known as "fire line charges." The ordinance had been declared unconstitutional in a prior suit in the same court by a different judge. The present trial judge concurred in that decision and found (1) that the plaintiffs represented a proper class, and (2) that because the invalid ordinance carried penalties for nonpayment of the periodic charges, the payments made of the charges must be considered as "payment under protest."

The City presents three points, as follows: (1) it was error to find this to be a proper class suit; (2) it was error to find the ordinance invalid; and (3) the trial judge erred in failing to find for the City upon its defense of laches. We hold that no reversible error is shown.

The finding of the trial judge that this was a proper class suit is supported by the holdings in the following cases: City of Miami Beach v. Tenney, 150 Fla. 241, 7 So.2d 136 (1942); Watnick v. Florida Commercial Banks, Inc., Fla.App.1973, 275 So.2d 278; Port Royal, Inc. v. Conboy, Fla.App.1963, 154 So.2d 734.

---

[1] "The class shall be all of the customers of the City of Miami Beach Beach, who paid the 'fire-line charges' under ordinance number 1850 of the City of Miami Beach, §45-6(j) of the City Code of the City of Miami Beach, since October 1, 1970."

In the City's argument directed to the trial court's finding that the ordinance is invalid, it is urged that the trial judge acted entirely upon the prior determination of another judge in another case in the same court. This argument is refuted by the specific findings contained in the judgment. The judge pointed out:

> "This Court concurs in the Opinion of Judge Schulz and independently finds, from the evidence presented, that the Ordinance Number 1850, also known as §45-6(j) of the City of Miami Beach Code, is invalid, unreasonable, arbitrary, discriminatory, illegal and contrary to the laws of the State of Florida, and does herein also set said Ordinance aside, and of no force and effect."

There remains on this point only the determination of whether there was sufficient competent evidence to support the finding. We find that the ordinance is invalid on its face and that, therefore, there was no need for special evidence on this issue. We are here dealing with an ordinance proposing to levy upon certain properties a monthly charge if the properties' fire lines exceeded stated sizes. This charge was not a charge for use but simply for the right to be connected into the City water system. The ordinance makes no attempt to earmark the funds for the purpose of financing an expansion of the system or for increased costs of any kind. It establishes a bare charge without relation to use or a legally collectable connection fee. See City of Dunedin v. Contractors & Builders Ass'n., Fla.App.1975, 312 So.2d 763. See also cases cited at 84 C.J.S. Taxation § 22b (1954) and 31 Fla. Jur. Taxation § 62 et seq.

It is true, as the City urges, that a trial judge is not bound by another trial judge's declaration of uncon-

stitutionality of an ordinance in the judgment of another case. But in view of the above-quoted finding of the present trial judge, which was made independently and which is supported in the record, we will affirm.

The City's contention, under its third point, that it was entitled to a judgment as a matter of law because of the laches of the plaintiffs is not supportable on this record. See Tampa Water Works Co. v. Wood, 104 Fla. 306, 139 So. 800 (1932).

Affirmed.

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 72-22041

BERNARD JACOBS, d/b/a,
THE PARK APARTMENT HOTEL,
Plaintiffs,

vs.

CITY OF MIAMI BEACH,
Defendant.

Dade County Courthouse,
Miami, Florida,
Wednesday, 10:45 a.m.,
November 12, 1975.

The above-styled cause came on for hearing before The Honorable Thomas A. Testa, Circuit Judge.

MR. PARDO: Your Honor, I have been practicing law since 1950. I undertook this fee on a contingency fee with my client and in the various things that were done in this case. I have expended approximately three hundred and fifty to four hundred hours involving interviews with clients, hearings before the Court, research of —

MR. WANICK: Now, Your Honor, may I also suggest this: The people who are paying this attorney's fee, of

course. I see nothing in the record where they have been given any notice as to this application for attorney's fee.

The City of Miami Beach is not paying this attorney's fee, the people for whom this fund has been collected are responsible for the attorney's fee.

I submit that due process of law requires that the people who pay the bill should be given notice of this application.

I do not see how you can award an attorney's fee against people without giving them notice as to what the testimony is going to be.

THE COURT: Let us proceed.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1976

CASE NO. 76-33
76-34

THE CITY OF MIAMI BEACH,
a municipal corporation,
Appellant,

vs.

BERNARD JACOBS, et al.,
Appellees.

Opinion filed December 23, 1976.

Appeals from the Circuit Court for Dade County, Thomas A. Testa, Judge.

Joseph A. Wanick, for appellant.

Joseph Pardo; Broad & Cassel, for appellees.

Before PEARSON and HENDRY, JJ., and CHARLES CARROLL (Ret.), Associate Judge.

CARROLL, Associate Judge.

This is an appeal by the City of Miami Beach, the defendant in a class action, from an order relating to at-

torney fees for the attorney for the plaintiff class. Both an interlocutory and a plenary appeal were filed. We deal with it as a plenary appeal.

The action involved the validity of an ordinance under which the City of Miami Beach had imposed and collected certain "fire line charges", over a period from certain of its citizens. The trial court entered a judgment holding the ordinance was invalid; that the action was properly a class action and that the members of the class were entitled to repayment by the city of such charges which were paid by them pursuant to the ordinance. The City of Miami Beach appealed therefrom and this court affirmed. See City of Miami Beach vs. Jacobs, 315 So. 2d 227 (Fla. 3d DCA 1975).

Thereafter the attorney for the plaintiff class moved for allowance of a fee. The trial court ordered that the defendant, City of Miami Beach, pay to the attorney for the plaintiff class, as his fee for representing the plaintiffs, 37% "of the monies collected by the City of Miami Beach from the class who paid the fire line charges plus interest at 6% per annum from the date of entry of the trial court judgment which was April 8, 1974", and directed the city to pay such sums to the plaintiffs' attorney forthwith.

The order then directed the City of Miami Beach to make refund to the members of the class, as follows:

> "Ordered, adjudged and decreed that the City of Miami Beach shall refund to each of the members of the Class who paid to the City of Miami Beach who paid the 'fire-line charges' the amounts paid by said members of the Class, together with interest, as aforesaid, less the amount of Thirty-

> seven percent (37%) hereinbefore awarded to Joseph Pardo, as a reasonable attorney's fee, for representing said Class, and said sums shall be paid forthwith".

On this appeal from that order the city seeks reversal on the ground that notice of the attorney's application for the fee was not given to the members of the class and seeks modification of the order to eliminate the provisions adding interest, and directing the city to pay the plaintiffs' attorney "forthwith" 37% of the amount collected by the city under the ordinance.

As to the first point it appears that there was a stipulation in the case waiving the requirement to give notice to the individual members of the class during the progress of the action. That would not be binding on the members of the class with reference to an application of their attorney for allowance of fees, since their attorney would not be entitled to waive notice for them for that purpose. However the objection in that regard does not come from any members of the plaintiff class and as raised on behalf of the defendant City of Miami Beach it is without merit.

We find no error in the provision of the order which conferred upon the members of the class interest on the amounts to which the court found the city was obligated to reimburse them. The interest provided for by the court was that which would accrue from the time of the entry of the judgment determining the plaintiffs were entitled to refunds from the city, as provided for by Section 55.03 Florida Statutes, 1973. See Southeastern Mobile Homes, Inc. v. Transit Homes, Inc. 192 So. 2d 53, 57-58 (Fla. 2d DCA 1966); Stone v. Jeffres, 208 So. 2d 827, 829 (Fla. 1968).

On the city's contention that the court erred in ordering payment of the fee forthwith, the city argues that the attorney's fee should be paid prorata by those members of the class to whom refund is made, by deducting the percentage fee due the attorney from the amount to which each individual member of the class is entitled, as and when refund payment is made to a member of the class entitled to and seeking refund.

We hold that argument of the city has merit. The city is not obligated for a fee to the attorney for the class. The attorney is entitled to a fee from the members of the class he represented who shall receive repayment from the city of the fire line charges paid by them. Some entitled thereto may not seek refund, or for some reason may not be located.

The provision of the order directing the City of Miami Beach to pay forthwith to the attorney a fee of 37% of the amount the city collected with interest thereon, when read with the above quoted provision of the order relating to refund payments to individual members of the class, does not make it clear whether the city was to pay the plaintiffs' attorney fees in advance or by withholding his fee from each refund made. To the extent the order is construed to call for the city to deliver forthwith to the attorney an amount which would be 37% of the sums collected under the invalid ordinance, it is hereby reversed. The order is amended to direct the city, upon a payment or refund being made to a member of the class, to withhold a 37% attorney's fee therefrom and from time to time, without undue delay, remit such withheld fees to the attorney.

It is so ordered.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 50,973

CITY OF MIAMI BEACH,
a municipal corporation,
Petitioner,

vs.

BERNARD JACOBS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, CITY OF MIAMI BEACH, a municipal corporation, presents this, its Petition for Writ of Certiorari, and states:

1. Petitioner seeks to have reviewed a decision of the District Court of Appeal of Florida, Third District, dated December 23, 1976, reported in _____ So.2d _____, and Order denying Petition for Rehearing, dated January 13, 1977, on a "direct conflict basis."

2. This Petition is presented under and pursuant to Article V, Section 3(b) 3, of the Florida Constitution, and Rule 4.5(c) of the Florida Appellate Rules.

3. Petitioner files herewith its motion requesting additional time to file an appropriate record of so much of the proceedings herein as is necessary to show the jurisdiction of this Court and also for additional time to file its brief in support of this Petition.

4. The facts in this case are as follows:

On October 26, 1972, the Respondent filed a suit in the Dade County Circuit Court challenging the City's ordinance imposing a "fire line charge" on all the City's commercial, hotel, and apartment house water consumers. On January 22, 1974, the Circuit Court entered a final decree declaring the ordinance void and unconstitutional, and directing the City to refund to the persons who paid this charge.

The Circuit Court reserved jurisdiction to award attorney's fees to the Plaintiffs' attorney for the reason that he claimed to represent a large number of Plaintiffs, constituting a "class". The Third District Court of Appeal affirmed this decision. City of Miami Beach v. Bernard Jacobs, et al., (3rd D.C.A.) 315 So.2d 227. This case was remanded to the Circuit Court. Thereafter, the Circuit Court held a hearing to determine the amount to be paid to the Plaintiffs' attorney for his fee. Notwithstanding the City's objection that the individual members of the purported class had been given no notice of a hearing or an opportunity to be heard on this matter, the Circuit Court proceeded to award 37% of the total amount which the City was required to refund. The City appealed this decree to the Third District Court of Appeal on the following grounds:

(1) That the individual members of the purported class had not been given notice or an opportunity to be heard in the hearing fixing attorney's fees.

(2) That the decree ordered the City to pay this fee out of the gross amount collected and held by the City instead of deducting the same from the individual refunds when, and if, demand was made upon the City for the same.

The Third District Court of Appeal affirmed the decree on the first ground, but reversed on the second.

The City files this Petition for Writ of Certiorari directed to that portion of the opinion and judgment of the Third District Court of Appeal which holds:

(A) That the City is not the proper party to raise the jurisdictional question pertaining to the individual members of the purported class, and

(B) That the individual members of the "class" are not entitled to notice and an opportunity to be heard on the amount of attorney's fees to be paid to the attorney for the purported "class".

5. The decision below is in direct conflict with the following decisions: Tenney v. City of Miami Beach, (Fla.) 11 So.2d 188; E. J. Frankel, et al. v. City of Miami Beach, Florida Supreme Court Case No. 45,932; Sanford v. Rubin, (Fla.) 237 So.2d 134, conformed to 239 So.2d 49; State Plant Board v. Smith, (Fla.) 110 So.2d 401; Cavalier v. Ignas, (Fla.) 290 So.2d 20, conformed to 294 So.2d 720; Ryan's Furniture Exchange v. McNair, (Fla.) 162 So. 483; Scholastic Systems, Inc. v. LeLoup, (Fla.) 307 So.2d 166.

For the reasons and authorities set forth herein, and to be set forth in Petitioner's brief, it is respectfully submitted that the decision sought to be reviewed is erroneous and in direct conflict on the same point of law with the decisions set forth in Paragraph 5 hereof.

WHEREFORE, Petitioner requests this Honorable Court to grant a Writ of Certiorari and enter its order quashing the decision and order sought to be reviewed, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

/s/ Joseph A. Wanick
JOSEPH A. WANICK,
City Attorney
Attorney for Petitioner
City of Miami Beach
1130 Washington Avenue
Miami Beach, Florida 33139
Phone: (305) 673-7470

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, was mailed this 25 day of January, 1977, to JOSEPH PARDO, ESQ., Penthouse One, Roberts Building, 28 W. Flagler Street, Miami, Florida 33130.

/s/ Joseph A. Wanick

Supreme Court of Florida

TUESDAY, MAY 31, 1977

CASE NO. 50,973

DISTRICT COURT OF APPEAL,
3rd DISTRICT
DCA CASE NOS. 76-33
76-34

CITY OF MIAMI BEACH, etc.,
Petitioner,
Cross-Respondent,

vs.

BERNARD JACOBS, et al.,
Respondents,
Cross-Petitioners.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

BOYD, Acting Chief Justice, ENGLAND, HATCHETT and KARL, JJ., Concur SUNDBERG, J., Dissents

The Cross-Petition for Writ of Certiorari in the above cause, is hereby denied.

BOYD, J., Acting Chief Justice, ENGLAND, SUNDBERG, HATCHETT and KARL, JJ., Concur

A True Copy

B

TEST:
/s/ SID J. WHITE
Sid J. White
Clerk Supreme Court.

cc: Hon. William Carter, Clerk
Hon. Richard Brinker, Clerk
Hon. Thomas A. Testa, Judge
Hon. Joseph A. Wanick,
City Attorney
Joseph Pardo, Esquire
Messrs. Broad & Cassel

IN THE SUPREME COURT OF FLORIDA

CASE NO. 50,973

CITY OF MIAMI BEACH,
a municipal corporation,
Petitioner,

-vs-

BERNARD JACOBS, et al.,
Respondents.

PETITION FOR REHEARING

COMES NOW the Petitioner, CITY OF MIAMI BEACH, and respectfully prays this Honorable Court for its order herein granting a rehearing of its Order and Judgment entered on May 31, 1977 denying the Petition of the City of Miami Beach for a Writ of Certiorari in the above cause. For grounds hereof, the Petitioner says:

1. That this Honorable Court did not address itself to the fundamental jurisdictional question raised by the Petitioner to the effect that the Dade County Circuit Court was wholly without jurisdiction because no claim was made by the Plaintiff (Respondent here) or any member of the purported class involved that his claim met the $2,500 jurisdictional amount required to invoke the jurisdiction of the Circuit Court, and, therefore, this Honorable Court is required to enter an order directing the Circuit Court to dismiss the cause for lack of jurisdiction.

2. That the City of Miami Beach, Petitioner herein, cited and relied upon the decision of the United States

Supreme Court in Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), for the proposition: (a) that the members of an alleged class are entitled to their day in court and to receive due, proper and reasonable notice of any court proceeding which affects their rights or property, and (b) that it is the legal duty of the plaintiff in any alleged class suit, at his expense, to give that notice to any and all putative members of an alleged class.

Since the decision of the United States Supreme Court is the law of the land, the Order and Judgment of the Dade County Circuit Court requiring the City to pay the cost of giving notice to the members of the alleged class is contrary thereto and deprives the City of Miami Beach of its rights and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

/s/ Joseph A. Wanick
JOSEPH A. WANICK,
City Attorney
Attorney for Petitioner
1130 Washington Avenue
Miami Beach, Florida 33139
Telephone: (305) 673-7470

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITION FOR REHEARING was mailed this 10th day of June, 1977, to JOSEPH PARDO, ESQUIRE, Penthouse One, Roberts Building, 28 West Flagler Street, Miami, Florida 33130.

/s/ Joseph A. Wanick

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JULY 29, 1977

CASE NO. 50,973

CITY OF MIAMI BEACH, ETC.,
Petitioner,

vs.

BERNARD JACOBS, ET AL.,
Respondents.

Petitioner's Petition for Rehearing is hereby denied, and it is further

ORDERED that the Petition for Stay of Mandate filed by petitioner is hereby granted and proceedings in this Court and in the District Court of Appeal, Third District, and in the Circuit Court in and for Dade County, Florida, are hereby stayed to and including August 29, 1977 to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

Y
CC: Clerk, DCA 3
Clerk Circuit Court
Hon. Thomas A. Testa, Judge
Hon. Joseph A. Wanick
Hon. Joseph Pardo
Broad & Cassel

A True Copy

TEST:
/s/ SID J. WHITE
Sid J. White
Clerk Supreme Court.